At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of January, 2023.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

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ROBERTO ABREU PEREZ,

Plaintiff,

- against-

Index No. 515104/2017

176 EAST 116 LLC, ARIANA CONTRACTING, INC., and LUXURY HOME IMPROVEMENT CORP.

Defendants.

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176 EAST 116 LLC,

Third-Party Plaintiff,

- against-

178 JJH, INC.,

Third-Party Defendant.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:	
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	73-90	93-95, 97-110
Opposing Affidavits (Affirmations)	115-125, 130-132, 134-135	127-129, 133
Reply Affidavits (Affirmations)	136	137-138
Memoranda of Law	91, 114	96, 126

Upon the foregoing papers in this personal injury action, plaintiff Roberto Abreu Perez (plaintiff) moves for an order, pursuant to CPLR 3212, granting him summary judgment with respect to liability on his Labor Law § 240 (1) cause of action as against defendant/third-party plaintiff 176 East 116 LLC (176 East), defendant Luxury Home Improvement Corp. (Luxury), and third-party defendant 178 JJH, Inc. (178 JJH) [Mot Seq 4].

176 East moves (in mot. seq. no. 5) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's Labor Law § 200 cause of action, common-law negligence claim, and lost wages claim, and granting it summary judgment on its claims against 178 JJH for contractual indemnification and breach of contract [Mot Seq. 5].

Factual Background

In this action premised on common-law negligence and violations of Labor Law §§ 200 and 240 (1), plaintiff alleges that he suffered injuries on June 27, 2017 while engaging in the comprehensive renovation of a building located at 176 East 116th Street, New York, NY (the Premises), owned by 176 East. The Premises was being converted from a variety department store to a supermarket for use by 176 East's tenant, 178 JJH. According to plaintiff, Luxury, acting as general contractor, pulled permits for the construction project and entered into a sub-contract agreement with FCS Construction, Inc., (FCS) to perform the work at the construction site. On the date of the accident, plaintiff was employed by FCS Core Construction Inc. as a laborer.[1] At the time of the accident, plaintiff was

[1] FCS Construction, Inc. and FCS Core Construction, Inc. are different corporate entities.

participating in the installation of a beam that was part of the erection of an interior wall. Plaintiff alleges that he was standing on the 15th rung of a ladder that was 20 feet tall. When he began to step on the 14th rung of the ladder in order to descend, the ladder suddenly shifted to the left causing him to fall to his right; the ladder fell to the ground. As plaintiff fell through the air, his right side struck the top of an adjacent wall. Plaintiff then grabbed onto the edge of the wall and hung onto it until he was rescued by co-workers. The plaintiff was transported by ambulance from the construction site to the hospital, where he was treated for his injuries, which he alleges are severe and permanent.

Procedural History

On or about August 4, 2017, plaintiff commenced this action by filing a summons and complaint in which he asserts claims under common-law negligence, Labor Law §§ 200, 240 (1), 240 (2), 240 (3), and 241 (6), and Rule 23 of the Industrial Code of the State of New York. On September 19, 2017, Luxury joined issue by serving a verified answer to the complaint denying the allegations in the complaint and asserting various affirmative defenses and cross claims against its co-defendants. 176 East answered the complaint, denied the allegations therein, and asserted various affirmative defenses and cross claims against its co-defendants. Defendant Ariana Contracting, Inc. (Ariana) has not appeared, and a default judgment was entered against it by order of this court dated December 6, 2017 (NYSCEF Doc No. 17). On February 13, 2019, 176 East commenced a third-party action against 178 JJH on February 13, 2019, asserting claims for contractual indemnification and breach of contract for failure to procure required insurance coverage. The parties engaged in discovery and plaintiff filed a note of issue that was subsequently vacated on motion by order of this court (NYSCEF Doc No. 55). Discovery resumed, and

plaintiff again filed a note of issue on January 7, 2022. The instant summary judgment motions ensued.

Plaintiff's Summary Judgment Motion

Labor Law § 240 (1) Claim Against 176 East

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez,* 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion (*see Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). If the initial prima facie showing has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial (*see* CPLR 3212 [b]; *see also Alvarez*, 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562). Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman,* 49 NY2d at 562).

Labor Law § 240 (1) imposes absolute liability on owners and contractors or their agents, when their failure to protect workers employed on a construction site from the risks associated with elevation differentials proximately causes injury to a worker (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Ross v Curtis-*

Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]).[2] "To establish liability under Labor Law § 240 (1), a plaintiff must demonstrate that the defendants violated the statute and this violation was a proximate cause of his injuries" (*Melchor v Singh*, 90 AD3d 866, 867 [2d Dept 2011]). "Plaintiff need not demonstrate . . . the precise manner in which the accident happened, or the extent of the injuries, was foreseeable" (*Gordon v Eastern Railway Supply*, 82 NY2d 555, 562 [1993]) (citations omitted). "Although [a] fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240 (1), liability will be imposed when the evidence shows that the subject ladder was . . . inadequately secured and that . . . he failure to secure the ladder was a substantial factor in causing the plaintiff's injuries" (*DeSario v City of New York*, 171 AD3d 867, 867-868 [2d Dept 2019] [internal quotations omitted]).

Plaintiff's deposition testimony that the ladder suddenly shifted to the left as he began to descend, causing him to fall to the right, constitutes evidence that the ladder was inadequately secured and is sufficient to establish, prima facie, that the ladder failed to provide proper protection (*see Cioffi v Target Corp.*, 188 AD3d 788, 791 [2d Dept 2020]; *Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759-760 [2d Dept 2018]; *Florestal v City of New York*, 74 AD3d 875, 876 [2d Dept 2010]). Plaintiff's testimony that he was following orders to engage in the work he was doing; that he used a ladder that was

[2] Labor Law § 240 (1), provides that, "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed".

provided to him by one of the contractors at the work site; that he obeyed the instructions with respect to placement of the ladder; that he descended facing the ladder; and that the ladder shifted causing him to fall establishes that the unsecured ladder was the proximate cause of his injuries. Accordingly, plaintiff has demonstrated, prima facie, that Labor Law § 240 (1) was violated, and that he is entitled to summary judgment as against 176 East (*see Cabrera*, 163 AD3d at 759-760).

The burden now shifts to 176 East to raise an issue of fact or otherwise "present some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his . . . injuries" (*Canas v Harbour at Blue Point Home Owners Assn., Inc.*, 99 AD3d 962, 963 [2d Dept 2012]). 176 East argues that plaintiff's deposition testimony fails to establish, as a matter of law, that it violated Labor Law § 240 (1) and that plaintiff's own acts and omissions were the sole cause of his injuries. 176 East further argues that plaintiff cannot explain what caused the ladder to move; did not request any additional equipment from his employer for the work he was engaged in; and did not secure the ladder with rope that was provided.

Additionally, 176 East argues that the affidavit of plaintiff's supervisor, Jong Bang (Bang) (NYSCEF Doc No. 116), contradicts material portions of his testimony, undermines plaintiff's credibility and creates a triable issue of fact. According to the affidavit, Bang avers that the plaintiff did not fall from the 15th step of the ladder, but instead fell approximately two feet. Bang goes on to state that the plaintiff disregarded instructions and descended the ladder while facing away from the ladder and then jumped off the second/third step. Bang denies that the ladder moved prior to plaintiff's accident.

As the plaintiff properly notes in the reply affirmation, the opposition of 176 East fails to demonstrate the existence of a factual issue warranting denial of plaintiff's motion. 176 East relies on the affidavit of Jong Bang as evidence that plaintiff was the sole proximate cause of his injuries and that plaintiff's credibility is in question. Plaintiff testified at his deposition that Bang was not present at the work site on the day and time of plaintiff's accident and this testimony is not refuted by the Bang affidavit. Further, Bang's affidavit does not establish that he witnessed the plaintiff's accident and does not otherwise lay any foundation for his statements as to how plaintiff's accident occurred or whether plaintiff was truthful. Bang's conclusory affidavit, which is not corroborated by any witnesses to plaintiff's accident, is entirely based on hearsay and is insufficient to raise a triable issue of fact with respect to proximate cause or plaintiff's credibility. Indeed, 176 East fails to offer "any evidence, other than mere speculation, that undermined the [plaintiff's] prima facie case or presented a bona fide issue regarding the plaintiff's credibility as to a material fact" (*Inga v EBS North Hills, LLC*, 69 AD3d 568, 569 [2d Dept 2010]). Accordingly, plaintiff's motion for summary judgment is granted as against 176 East.

Labor Law § 240 (1) Claim Against Luxury

Plaintiff argues that Luxury was the general contractor on the construction project and, as such, is liable under Labor Law § 240 (1). As evidence of Luxury's role, plaintiff submits a contract between Luxury and FCS Construction, Inc., signed by Bang on behalf of FCS in which Luxury is identified as the general contractor for the work to be done at the Premises and FCS is identified as a subcontractor (NYSCEF Doc No. 88). Plaintiff also submits three work permits for the project, issued by the New York City Department of

Buildings, which contain Luxury's license number, and contends that such evidence further demonstrates Luxury's role as general contractor for the project (NYSCEF Doc No. 89). In opposition, Luxury contends that it had no involvement in the construction project, and that it drafted the indemnity agreement that plaintiff submitted for purposes of submitting a bid for the project, which it ultimately did not win. In deposition testimony, and in a sworn affidavit submitted in opposition to plaintiff's motion, Jonathan Lin, Luxury's vice president and manager, states that Luxury submitted its license information to obtain a bid and that said information was used to obtain permits for the project without its knowledge or involvement in same. Plaintiff testified that he did not know of Luxury or anyone from Luxury at the job site. Daniel Min (Min), the office manager for 178 JJH, testified that he did not know what role Luxury played in the construction project and that FCS was the general contractor on the project. In light of the evidence in this case, there exist questions of material fact as to whether Luxury was the general contractor and what role, if any, Luxury had on the construction project. Accordingly, plaintiff's motion for summary judgment as to Luxury's liability on his Labor Law § 240 (1) claim is denied.

Labor Law § 240 (1) Claim Against 178 JJH

To the extent that plaintiff is seeking summary judgment under Labor Law § 240 (1) as against 178 JJH, his motion is denied as that entity is not a named defendant in the instant action. The court notes that on September 13, 2018, plaintiff filed a motion seeking to amend his complaint in this action to add 178 JJH as a party defendant, which was denied by this Court's Order dated January 9, 2019, without prejudice to seek renewal. The following day, on January 10, 2019, plaintiff filed a separate action against

178 JJH in New York County captioned *Roberto Abreu Perez v 178 JJH Inc.* (Index Number: 150268/2019) (hereinafter, "the Manhattan Action").[3] On or about April 15, 2019, 178 JJH moved in a pre-answer motion to dismiss the Manhattan Action due to this instant action pending, and the plaintiff cross-moved to consolidate the Manhattan Action with this instant action. By Order dated October 3, 2019, the Honorable Doris Ling-Cohan, J.S.C. granted plaintiff's cross motion to consolidate the Manhattan Action with the instant action and directed as follows: "within 30 days from entry of this order, counsel for the plaintiff shall serve a certified copy of this order upon the Clerk of the Supreme Court, New York County, and shall pay the appropriate fee, if any, for such transfer and shall contact the staff of said Clerk to arrange for the effectuation of the transfer to Kings County in an efficient manner" (NYSCEF Doc No. 220).

In opposition to plaintiff's motion, 178 JJH asserts that the plaintiff (1) never contacted the Clerk's Office in Kings County or New York County; (2) never served a certified copy of the October 3, 2019 Order on the Kings County Clerk's Office; and (3) never filed a Notice to County Clerk pursuant to CPLR 8019 (c). Thus, 178 JJH argues that the plaintiff failed to effectuate the transfer and consolidation of the Manhattan Action with the instant action. In reply, the plaintiff does not dispute 178 JJH's contention that he never took steps to effectuate the consolidation of the Manhattan Action with the instant action.

A review of the case file maintained by the Court reveals that the Manhattan Action and the within action were never consolidated. As such, the Manhattan Action is not

[3] In the Manhattan Action, plaintiff asserts a Labor Law § 240 (1) claim, as well as other Labor Law claims against 178 JJH.

properly before this Court. Therefore, that branch of plaintiff's motion seeking summary judgment on his Labor Law § 240 (1) claim against 178 JJH is denied. Further, the plaintiff is hereby directed to take the appropriate steps to effectuate the consolidation of the Manhattan Action with the instant action as mandated by the New York County Decision and Order dated October 3, 2019 (NYSCEF Doc No. 220).

176 East's Summary Judgment Motion

176 East moves for summary judgment on plaintiff's common-law negligence, Labor Law § 200, and loss of earnings claims, and on its claims against 178 JJH for contractual indemnification and breach of contract. As an initial matter, 178 JJH argues that 176 East's motion for summary judgment is untimely under Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6 because it was made more than 60 days after the filing of the note of issue on January 7, 2022 (*see Goldin v New York & Presbyt. Hosp.*, 112 AD3d 578, 579 [2d Dept 2013]; CPLR 3212 [a]). Pursuant to the Kings County Court Rules, 176 East had until March 8, 2022 to file its summary judgment motion. 176 East's motion was filed on March 9, 2022, the 61st day after the filing of the note of issue, and thus one day late.

"Since the Court of Appeals decision in *Brill v City of New York* (2 NY3d 648 [2004]), a party moving for summary judgment outside the statutory (CPLR 3212 [a]) or court-imposed time limit must show good cause for the delay" (*Pena v Women's Outreach Network, Inc.*, 35 AD3d 104, 108 [1st Dept 2006]). In *Brill*, the Court concluded that "good cause" requires a "satisfactory explanation for the untimeliness- rather than simply permitting meritorious, non-prejudicial filings, however tardy" (*Brill*, 2 NY3d at 652; *see also Miceli v State Farm Mut. Auto Ins. Co.*, 3 NY3d 725 [2004]; *Demacopolous v City of*

New York, 73 AD3d 842 [2d Dept 2010]). If the movant fails to demonstrate good cause, then it is unnecessary to reach the merits of the motion for summary judgment (*see Finger v Saal*, 56 AD3d 606 [2d Dept 2008]). It is also immaterial that the delay is a relatively short period. Indeed, a motion for summary judgment that is even one day late still requires "good cause" to be shown for the delay (*Derby v Britan*, 89 AD3d 891, 892 [2d Dept 2011]; *Milano v George*, 17 AD3d 644 [2d Dept 2005]).

Here, in its reply affirmation, 176 East has failed to show "good cause" or provide any excuse for the delay of bringing its motion for summary judgment. Instead, it merely argues that this court has the discretion to overlook the delay in filing its summary judgment motion and, in any event, that none of the parties have been prejudiced by the one-day delay. The law is clear that "[i]n the absence of a good cause showing, the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment." (*John P. Krupski & Bros. v Town Bd. of Town of Southold*, 54 AD3d 899, 901 [2d Dept 2008]; *see Bricenio v Perez*, 178 AD3d 1002 [2d Dept 2019]; *see also St. John's Univ. v Butler Rogers Baskett Architects, P.C.*, 105 AD3d 728, 729 [2d Dept 2013]; *Powers v Sculco*, 89 AD3d 1075 [2d Dept. 2011]; *Deberry-Hall v County of Nassau*, 88 AD3d 634 [2d Dept. 2011]). Under these circumstances, this Court is required to deny 176 East's motion as untimely regardless of the merits (*see Miceli*, 3 NY3d at 727 [absent good cause, summary judgment motion even one day late shall be denied as untimely]).

Conclusion

Accordingly, it is hereby

ORDERED that plaintiff's motion (mot. seq. no. 4) for summary judgment on his Labor Law § 240 (1) claim is granted as against 176 East, and denied as to Luxury and 178 JJH; and it is further

ORDERED that 176 East's motion (mot. seq. no. 5) for summary judgment is denied as untimely; and it is further

ORDERED that plaintiff is directed to take the appropriate steps to effectuate the consolidation of the Manhattan Action with the instant action as mandated by the New York County Decision and Order dated October 3, 2019 (NYSCEF Doc No. 220).

All relief not specifically granted herein has been considered and is denied.

This constitutes the decision, and order of the court.

E N T E R,

J. S. C.

Hon. Wavny Toussaint
J.S.C.

KINGS COUNTY CLERK
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